

In The Iowa Supreme Court
Supreme Court No. 16-1078

VALERIE BANDSTRA, ANNE BANDSTRA, RYAN BANDSTRA, and
JASON BANDSTRA

Plaintiffs-Appellants,

v.

COVENANT REFORMED CHURCH,

Defendant-Appellee.

Appeal from the Iowa District Court for Marion County

The Honorable John D. Lloyd

Defendant-Appellee's Final Brief and Argument—Oral Argument Requested

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Statement Of The Issues Presented For Review

- I. **More than two years before they filed their petition, Plaintiffs had inquiry notice of the Church's alleged failure to prevent Edouard's conduct. The District Court correctly applied the two-year statute of limitations and dismissed these claims.**

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Breiner v. Nugent, 111 N.W. 446 (Iowa 1907)
Borchard v. Anderson, 542 N.W.2d, 247 (Iowa 1996)
Buechel v. Five Star Quality Care Inc., 745 N.W.2d 732 (Iowa 2008)
Buszka v. Iowa City Cmty. Sch. Dist., No. 16-0011, 2017 WL 512487 (Iowa Ct. App. Feb. 8, 2017)
Callahan v. State, 464 N.W.2d 268 (Iowa 1990)
Chrischilles v. Griswold, 150 N.W.2d 94 (Iowa 1967)
Doe v. Cherwitz, 518 N.W.2d 362 (Iowa 1994)
Franzen v. Deere & Co., 377 N.W.2d 660 (Iowa 1985)
Godar v. Edwards, 588 N.W.2d 701 (Iowa 1999)
Green v. Racing Ass'n of Central Iowa, 713 N.W.2d 234 (Iowa 2006)
Hegg v. Hawkeye Tri-Cnty. REC, 512 N.W.2d 558 (Iowa 1994)
Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n, 453 N.W.2d 512 (Iowa 1990)
In re Marriage of Wessels, 542 N.W.2d 486 (Iowa 1995)
Kern v. Palmer Coll. of Chiropractic, 757 N.W.2d 651 (Iowa 2008)
Langner v. Shannon, 533 N.W.2d 511 (Iowa 1995)
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Sparks v. Metalcraft, Inc., 408 N.W.2d 347 (Iowa 1987)
State Farm Mut. Auto. Ins. Co. v. Pfibsen, 350 N.W.2d 202 (Iowa 1984)
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Vande Kop v. McGill, 528 N.W.2d 609 (Iowa 1995)
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Wetter v. Dubuque Aerie No. 568 of the Fraternal Order of Eagles, 588 N.W.2d 130 (Iowa Ct. App. 1998)
Woodroffe v. Hasenclever, 540 N.W.2d 45 (Iowa 1995)

Federal Constitution

U.S. Const., First Amendment

Federal Cases

Burnett v. New York Cent. R.R. Co., 380 U.S. 424 (1965)
Frideres v. Schiltz, 113 F.3d 897 (8th Cir. 1997)
O'Rourke v. City of Providence, 235 F.3d 713 (1st Cir. 2001)
Page v. United States, 729 F.2d 818 (D.C. Cir. 1984)
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EEOC v. J.W. Mays, Inc., No. 88CV3020, 1989 WL 106890 (E.D.N.Y. Sept. 13, 1989)
Isely v. Capuchin Province, 880 F. Supp. 1138 (E.D. Mich. 1995)
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Other State Cases

Gibson v. Brewer, 952 S.W.2d 239 (Mo. 1997)
J.M. v. Minn. Dist. Council of Assemblies of God, 658 N.W.2d 589 (Minn. Ct. App. 2003)
Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995)

Iowa Statutes

Iowa Code section 614.1
Iowa Code § 614.8
Iowa Code § 614.8A

Iowa Rules

Iowa Rule of Civil Procedure 1.904(2)

II The District Court properly dismissed Plaintiff's claims that the Church negligently exercised its religion following the disclosure of Edouard's conduct.

Iowa Constitution

Iowa Const. art. I, § 3

Iowa Cases

Green v. Racing Ass'n of Central Iowa, 713 N.W.2d 234 (Iowa 2006)
Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)

Federal Constitution

U.S. Const. First Amendment

Other State Cases

Bladen v. First Presbyterian Church of Sallisaw, 857 P.2d 789 (Okla. 1993)

Franco v. The Church of Jesus Christ of Latter-day Saints, 21 P.3d 198 (Utah 2001)

III The District Court properly dismissed Plaintiff's defamation claims because the alleged defamatory statements were subject to a qualified privilege, were protected opinion, or were not published.

Iowa Cases

Alcala v. Marriott Int'l, Inc., 880 N.W.2d 699 (Iowa 2016)

Barreca v. Nickolas, 683 N.W.2d 111 (Iowa 2004)

Behr v. Meredith Corp., 414 N.W.2d 339 (Iowa 1987)

Green v. Racing Ass'n of Central Iowa, 713 N.W.2d 234 (Iowa 2006)

Hubby v. State, 331 N.W.2d 690 (Iowa 1983)

Kennedy v. Zimmerman, 601 N.W.2d 61 (Iowa 1999)

Kern v. Palmer Coll. of Chiropractic, 757 N.W.2d 651 (Iowa 2008)

Kiesau v. Bantz, 686 N.W.2d 164 (Iowa 2004)

Kliebenstein v. Iowa Conference of United Methodist Church, 663 N.W.2d 404 (Iowa 2003)

Marks v. Estate of Hartgerink, 528 N.W.2d 539 (Iowa 1995)

State v. Edouard, 854 N.W.2d 421 (Iowa 2014)

Yates v. Iowa W. Racing Ass'n, 721 N.W.2d 762 (Iowa 2006)

Federal Constitution

U.S. Const., First Amendment

Federal Cases

Bruning v. Carroll Cmty. Sch. Dist., No. C04-3091-MWB, 2006 WL 1234822 (N.D. Iowa May 3, 2006)

Other Authorities

50 Am.Jur.2d *Libel & Slander*, § 340, at 663 (1995)

50 Am.Jur.2d *Libel & Slander* § 117, at 420 (1995)

Restatement (Second) of Torts § 596 cmt. E

IV The District Court correctly held that Plaintiffs may not rely on offensive issue preclusion from *State v. Edouard* to bar Defendants from litigating a host of unrelated legal issues in the instant action.

Iowa Cases

Aid Ins. Co. v. Chrest, 336 N.W.2d 437 (Iowa 1983)
City of Johnston v. Christenson, 718 N.W.2d 290 (Iowa 2006)
Dettmann v. Kruckenberg, 613 N.W.2d 238 (Iowa 2000)
Fischer v. City of Sioux City, 654 N.W.2d 544 (Iowa 2002)
Gardner v. Hartford Ins. Acc. & Indemn. Co., 659 N.W.2d 198 (Iowa 2003)
Grant v. Iowa Dept' of Human Servs., 722 N.W.2d 169 (Iowa 2006)
Green v. Racing Ass'n of Central Iowa, 713 N.W.2d 234 (Iowa 2006)
Harris v. Jones, 471 N.W.2d 818 (Iowa 1991)
Harrison v. State Bank of Bussey, 440 N.W.2d 398 (Iowa Ct. App. 1989)
Hunter v. City of Des Moines, 300 N.W.2d 121 (Iowa 1981)
Leavens v. Second Injury Fund of Iowa, No. 11-1636, 2012 WL 2411684 (Iowa Ct. App. June 27, 2012)
State v. Edouard, 854 N.W.2d 421 (Iowa 2014)

Iowa Statutes

Iowa Code § 709.15(2)

Other Authorities

Vestal, Issue Preclusion and Criminal Prosecutions, 65 Iowa L. Rev. 281, 335 (1980)

V The District Court correctly applied the clergy privilege in the instant action.

Iowa Cases

Reutkemeier v. Nolte, 161 N.W. 290 (Iowa 1917)
State v. Burkett, 357 N.W.2d 632 (Iowa 1984)
State v. Richmond, 590 N.W.2d 33 (Iowa 1999)

Iowa Statutes

Iowa Code Section 622.10

Other Authorities

Vestal, Issue Preclusion and Criminal Prosecutions, 65 Iowa L. Rev. 281, 335 (1980)

VI The District Court's discovery rulings must be upheld.

Iowa Cases

Hubby v. State, 331 N.W.2d 690 (Iowa 1983)

McClure v. Walgreen Co., 612 N.W.2d 225 (Iowa 2000)

Sioux Pharm, Inc. v. Eagle Laboratories, Inc., 865 N.W.2d 528 (Iowa 2015)

Soo Line R. Co. v. Iowa Dept. of Transp., 521 N.W.2d 685 (Iowa 1994)

Iowa Statutes

Iowa Code Section 622.10

Other Authorities

Vestal, Issue Preclusion and Criminal Prosecutions, 65 Iowa L. Rev. 281, 335 (1980)

Routing Statement

Defendant-Appellee Covenant Reformed Church (the “Church”) agrees the Iowa Supreme Court should retain this case. It presents substantial constitutional questions about the application of the First Amendment to religious organizations. Iowa R. App. P. 6.1101(2)(a).

Statement Of The Facts¹

When the Church learned for the first time that its pastor, Patrick Edouard (“Edouard”), had abused his relationship with certain female members of its congregation, its leadership was shocked. Within hours, the Church’s leadership confronted Edouard, accepted his resignation, and began the process of deposing him so he could not serve again as a pastor. Edouard’s misconduct led to his criminal conviction, which the Court examined in *State v. Edouard*, 854 N.W.2d 421, 430-31 (Iowa 2014). The instant action is not about Edouard. Plaintiffs dismissed their claims against him, as well as their respondeat superior claims against the Church predicated upon Edouard’s conduct.

¹ A detailed recitation of the facts on which the Church relied is set forth in Defendants’ Combined Statement of Undisputed Material Facts in Support of Motion for Summary Judgment. (C.App.II 99-160).

Rather, this case arises out of Plaintiffs' disagreement with how the Church supervised Edouard and interpreted and applied the Bible and Church doctrine after learning of Edouard's conduct. While condemning the conduct of Edouard, the Elders believed the Bible teaches us that the women were led into temptation by Edouard, succumbed to temptation, and therefore sinned. Plaintiffs contend that they were victims of clergy sexual abuse and, therefore, without any blame or responsibility in God's eyes. As such, they contend they have committed no sins, have nothing to confess, and need not seek forgiveness. Plaintiffs' disagreement with the Church's deeply-rooted and sincerely held religious beliefs, as one might expect, ultimately led Plaintiffs to leave the Church. But they were not content to find a new Church. Plaintiffs filed a petition alleging multiple tort theories against the Church, of which they were voluntary and knowing members, predicated on the Church's convictions. The District Court correctly entered summary judgment on all claims.

The Church

The Church is located in Pella, Iowa and is affiliated with the United Reformed Churches in North America. (C.App.II 101, ¶¶1, 3).

The Board of Elders

The Board of Elders (“Elders”) acts as the Church’s governing body. (*Id.* ¶4). It is composed of sixteen men from the congregation who are called to serve and elected by the congregation. (C.App.II 102, ¶5).

The Consistory of the Church is composed of the Elders and pastor. (*Id.* ¶6). Elders are responsible for watching over the congregation as a spiritual matter, to “encourage them, exhort them and warn them.” (*Id.* ¶8). The Elders are looked upon to interpret the Bible. (C.App.II 102-103, ¶9). They are responsible for applying scripture within the congregation. (C.App.II 103, ¶10). The Elders are responsible for admonishing or disciplining members of the Church who the Elders believe have fallen short of the Church’s teachings and beliefs. (*Id.* ¶11). Any discipline imposed by the Elders is imposed “according to the principles taught in Scripture” and is spiritual in nature. (*Id.* ¶¶12, 13). The Elders exercise discipline because of the spiritual authority which they receive from Christ by virtue of their ordination. (*Id.* ¶13). Therefore, discipline within the church is rooted in spiritual (i.e., biblical and theological) principles, rather than secular or psychological principles. (*Id.*). Church members make a profession of faith, in which they promise to submit to the government of the Church, its

admonition, and discipline if they should become delinquent either in doctrine or in life. (C.App.II 104, ¶15).

Elders periodically receive requests from members of the congregation to have someone from outside the Church speak to the congregation. (*Id.* ¶17). In evaluating those requests, the Elders consider whether the message is consistent with the teachings of scripture and the Doctrine of the Church. (*Id.* ¶18). The Elders do not allow someone to speak to the congregation who is going to express views that are inconsistent with scripture or with Church Doctrine. (*Id.* ¶19). The Elders are charged with the responsibility to determine whether to allow someone to address the congregation. (*Id.* ¶20). Once the Elders decide whether someone will be allowed to speak to the Congregation, it is incumbent on the members of the Church to respect the Elders' decision. (C.App.II 150, ¶22).

As the governing body for the Church, the Elders are ultimately accountable to God. (C.App.II 107, ¶36). The Elders are free to receive input from anyone that they believe can help them make good decisions consistent with Biblical principles but they are not required to receive such input. (*Id.* ¶37). The Elders have no obligation to consider input from others, including members of the congregation, regarding the process or imposition of discipline. (*Id.* ¶38).

Plaintiffs

Ryan and Anne Bandstra became members of the Church in 1999.² (*Id.* ¶40). They joined the Church knowing of its conservative doctrinal values and view of the Bible. (*Id.* ¶41). Ryan made a profession of faith when he joined the First Christian Reformed Church, a Christian Reformed Church. (*Id.* ¶42). Anne made a profession of faith when she joined the Oskaloosa Christian Reformed Church, a Christian Reformed Church. (*Id.* ¶43).

Jason and Valerie Bandstra became members of the Church in 2000. (C.App.II 108, ¶46). They joined the Church knowing of its conservative doctrinal values and view of the Bible. (*Id.* ¶47). At the time Valerie and Jason joined the Church, they made a profession of faith. (*Id.* ¶48).

Edouard

From 2003 to December 13, 2010, Edouard served as the Church's only pastor. (*Id.* ¶49). The Elders supervise the pastor by meeting with him twice a month, regularly evaluating his preaching of the Word, and relying on members of the congregation to report any concerns. (C.App.II 108-109, ¶¶50-51). The Elders conduct yearly in-home visits with all members of the congregation during which the members may raise concerns regarding the

² To avoid confusion, Plaintiffs will be referred to by their first names.

Church. (C.App.II 109, ¶52). During those in-home visits, Elders expect members of the congregation to raise any concerns about any possible inappropriate conduct by Edouard. (*Id.* ¶53). From 2003 (when Edouard was hired) to the end of 2010 (when facts about his inappropriate actions began to be discovered and he immediately resigned), no member of the Church reported any concerns about Edouard to any Elder. (*Id.* ¶54).

During twice-monthly Consistory meetings, the Elders received reports from Edouard regarding his activities as pastor, including who he had visited and spiritual guidance he was providing to members. (C.App.II 110, ¶55). Although Edouard occasionally reported his counseling activities to the Elders, he never reported that he was providing counseling or spiritual guidance to Anne or Valerie. (*Id.* ¶56). No Church member, or any other person deposed in this case other than the women with whom Edouard was having sexual relationships, suspected or had any reason to suspect that Edouard was having inappropriate sexual contact with Church members prior to December 10, 2010. (C.App.II 111-112, ¶¶64-65).

Valerie's Interactions with Edouard

In early 2006, Valerie contacted Edouard to arrange a visit to discuss her emotional struggles with work and infertility. (C.App.II 112, ¶66). Valerie went to Edouard's home and they met in his study. (*Id.* ¶67). At the

time, nobody at the Church was aware of Valerie's visit to Edouard's home. (*Id.* ¶69).

Valerie alleges that in this meeting, Edouard had sexual intercourse with her against her will. (C.App.II 113, ¶71). Valerie immediately believed that she had been raped by Edouard and that his actions were wrong/harmful. (*Id.* ¶2). Valerie, by her own admission, began experiencing mental distress the night of and the day after she was allegedly raped by Edouard. (*Id.* ¶73).

According to Valerie, she and Edouard never had sexual intercourse again. (*Id.* ¶75). After their initial sexual interaction in 2006, any activity characterized as counseling by Valerie and conducted by Edouard occurred in Des Moines (consisting of oral sex on two occasions) or telephone contact. (*Id.* ¶76). Valerie did not tell anyone that she was continuing "counseling" sessions with Edouard and she does not believe that anyone, including her husband Jason, knew about them. (C.App.II 115 ¶84).

Valerie Concludes Edouard's Conduct is
Clergy Sexual Abuse in October 2009.

In October 2009 Valerie's sister, Patty Zylstra, told Valerie that Edouard had once tried to kiss her.³ (C.App.II 116, ¶93). Upon learning this, Valerie realized for "the first time that I really knew [in] my gut that –

³ Zylstra has since remarried, and her last name is now Poldo.

what [Edouard] was doing” and, more specifically, that she realized he was abusing her. (*Id.* ¶¶95). At that time, Valerie, realized Edouard was using his position and trust as a pastor to “recruit” women for “the very purpose of abusing them.” (C.App.II 116, ¶¶96). Valerie knew that Edouard’s conduct was “more than wrong” and it was a “pattern” in which his intent was to sexually abuse women. (*Id.* ¶¶97). In October 2009 Valerie contacted Edouard, accused him of clergy sexual abuse “in so many words” and broke off all communication with him. (*Id.* ¶¶98).

Valerie Seeks Counseling in April 2010

In April 2010, Valerie sought counseling for problems she attributed to Edouard’s abuse. (*Id.* ¶¶102-103).

Anne’s Interactions with Edouard

In April or May 2008, after Edouard had approached and met with Anne on two other occasions (ostensibly about counseling), Edouard stopped by Anne’s home. (C.App.II 21-23, ¶¶118-124, 128). When Edouard arrived, he “grabbed [Anne] and turned [her] around and started kissing [her].” (*Id.* ¶¶129). Anne admits that she kissed Edouard back despite knowing that it was “wrong” and “inappropriate” for a pastor to kiss her. (*Id.*). She ended the contact with Edouard before any sexual

intercourse occurred. (*Id.*). Anne did not tell anyone about this incident. (*Id.* ¶130).

Approximately a week later, Edouard again stopped by Anne's home. (*Id.* ¶131). Edouard kissed Anne and began undressing her. (*Id.*). Anne admits she knew this was "wrong" and "inappropriate." (*Id.*). Anne did not tell anyone about this incident. (*Id.*). She ended contact before any sexual intercourse took place. (*Id.*).

After another week passed, Edouard stopped by Anne's home and they had sexual intercourse. (*Id.* ¶132). Thereafter, Edouard and Anne engaged in sexual intercourse on numerous occasions between May 2008 and December 10, 2010. (*Id.* ¶133). From the time of her first sexual contact with Edouard, Anne fully admits that she knew that it was wrong and did it anyway. (C.App.II 122, ¶135).

In May of 2010 Edouard told Anne that he had had sexual relations with two other members of the Church, Valerie and Sandy Kanis, and that he had kissed Valerie's sister. (*Id.* ¶136). Anne believed at the time that Edouard had been providing counseling to Valerie. (*Id.* ¶137). Edouard also told Anne that he had been counseling Kanis and Zylstra. (*Id.* ¶138). Upon learning of Edouard's sexual relations with these other women, Anne "started putting all the pieces together very quickly." (*Id.* ¶139).

Anne and Edouard Disclose a Supposed “Kiss” to Ryan

On the afternoon of Friday, December 10, 2010, Edouard and Anne were having sexual intercourse in the basement of Anne’s home when Ryan unexpectedly arrived home. (C.App.II 125, ¶53). Edouard left the home through the back basement door and was not discovered by Ryan. (*Id.* ¶154).

A short time later, Edouard (whose vehicle was sitting in the Bandstra’s driveway) came to the front door, spoke to Ryan, and claimed he had been in the Bandstra’s forest behind their home. (*Id.* ¶157). Ryan felt something “just wasn’t right” with the situation. (C.App.II 126, ¶158). He continued to question Anne about the circumstances of Edouard being at their home and Anne eventually told him that Edouard had given her a hug and it “turned into a kiss.” (*Id.* ¶159).

The Bandstras Disclose Edouard’s Conduct with Anne to the Elders

The following day, at a family Christmas gathering, Ryan asked Valerie whether there was any reason for him to worry about Edouard and Anne being together. (*Id.* ¶163). Valerie expressed concern and asked Ryan to call her the following Monday. (*Id.*). On Monday, December 13, 2010, Ryan called Valerie. (*Id.* ¶164). Valerie stated that she “can’t believe this

happened to Anne, too,” and directed Ryan to call Jason, which he did. (*Id.* ¶¶164-165).

Later, on December 13, 2010, Ryan and Jason decided to inform the Elders. (C.App.II 127, ¶166). Jason called Clarence Hettinga, the President of the Elders, and disclosed that Edouard had inappropriate contact a “kiss” with Anne. (*Id.* ¶167).

The Elders Accept Edouard’s Resignation

On the evening of December 13, 2010, Jason and Ryan met with Hettinga and two other Elders. (*Id.* ¶169). Edouard came to the meeting later and Hettinga questioned him about having inappropriate contact with Anne. (*Id.*). Edouard acknowledged having inappropriate contact with Anne. (*Id.* ¶170). Edouard tendered his resignation and the Elders voted to accept it that evening. (*Id.* ¶¶171-172). The Church immediately began the process of “deposing” Edouard as minister to ensure that he would not serve as a minister in any capacity at any other location. (C.App.II 128, ¶173).

The Elders Inform the Congregation of Edouard’s Resignation

On December 15, 2010, the Elders wrote the congregation that they had accepted Edouard’s resignation. (C.App.II 130, ¶183). The Elders disclosed Edouard had tendered his resignation and his “sins are of such a nature that they warrant our acceptance of [his] resignation.” (*Id.* ¶184).

The letter did not disclose the nature of Edouard's sins or identify any women with whom he had sexual relations. (*Id.*). None of the written communications from the Church about this entire matter have ever identified any of the women who are known to have had sexual contact with Edouard. (*Id.* ¶185). The Church also made arrangements for counseling to be available to the members of the congregation, including the Bandstras. (C.App.II 131, ¶187).

The Elders Address Edouard's Conduct

On December 17, 2010, the Elders met with Edouard (*Id.* ¶189). Edouard admitted to committing adultery with Valerie and having "inappropriate contact" with Anne. (*Id.*). Although Edouard denied having inappropriate contact with any other women in the congregation, the Elders subsequently learned that he had had sexual relations with two other women in the Church. (*Id.* ¶190).

On January 11, 2011 the Consistory admonished Edouard to come before them to confess to the sins of lying and adultery. (C.App.II 134, ¶203). On January 13, 2011 Edouard appeared before the Elders and confessed to adultery. (*Id.* ¶204). On January 26, 2011 the Elders voted to depose Edouard from the ministry at the Church and the United Reformed Churches federation. (C.App.II 136, ¶212).

Valerie and Anne Appear Before the Elders and Confess

On December 27, 2010, Valerie and Anne voluntarily appeared with their husbands before the Elders. (C.App.II 133, ¶197). Valerie and Anne confessed to the sin of adultery at the Elders meeting. (*Id.* ¶¶198-200). Valerie later claimed that she had only confessed to the sin of “idolatry.” (*Id.*). Hettinga, on behalf of the Elders, granted forgiveness to them. (*Id.* ¶201).

The Elders Inform the Congregation of the Contact between Edouard and Members of the Congregation

On January 14, 2011 the Elders wrote the congregation of a “prolonged period of sexual immorality and/or inappropriate contact between Edouard and multiple women congregant members.” (C.App.II 134, ¶205). The letter stated:

These members will remain unnamed by the Consistory and we admonish the congregation that they remain unnamed by you also. In love for the body of Christ, we must demonstrate our forgiving love for these members by being prudent with our speech and persistent in prayer for us all. We are thankful for those members who came before the Elders and eagerly desire to remain a part of us. We whole-heartedly accept them.

(*Id.*).

Julie Hooyer's Letter to the Elders

On January 13, 2011 Julie Hooyer, a social worker and Church member, wrote to the Elders. (C.App.II 135, ¶207). Hooyer suggested Edouard's conduct constituted "sexual abuse" and urged the Elders to consider consulting with a mental health professional specializing in sexual abuse. (*Id.*). Hooyer later prepared a second letter that she proposed the Elders send to the congregation. (*Id.* ¶208). The letter reiterated Hooyer's view that Valerie and Anne were "victims" of sexual abuse by Edouard, that the relationships were "not affairs" and that the women should not be "blamed" for their actions. (*Id.*).

The Elders decided against sending Hooyer's proposed letter because they believed it was inconsistent with the truth according to the Bible. (*Id.* ¶¶209-210). The Elders believed, based on the Bible that Valerie and Anne, while having been sinned against by Edouard, had also sinned in their actions and inactions. (*Id.* ¶211).

The Elders Meet with Hooyer, Anne, and Ryan to Discuss Their Proposals

On February 4, 2011, Hooyer, Ryan, Anne, and others, met with the Elders and suggested the Elders "form a task force to inform and counsel the Congregation." (C.App.II 136, ¶215). They also suggested the Elders write a letter to the congregation using the terms "clergy abuse" and "victims"

rather than adultery. (*Id.* ¶216). The Elders asked Hooyer to submit suggestions for such a letter. (*Id.*). The Elders discussed Hooyer's suggestions but felt they "had very little Biblical or theological content or viewpoint." (C.App.II 136, ¶217).

During a February 7, 2011 meeting, the Elders reviewed and discussed Hooyer's proposed letter to the congregation. (*Id.* ¶218). The Elders concluded they "should be more concerned about how God feels about this issue rather than how the Congregation feels." (*Id.*). The Elders believed, based on the Bible that the women in question, while having been sinned against by Edouard, had also sinned in their actions and inactions and that stating or suggesting otherwise was not consistent with the dictates of the Bible. (*Id.* ¶219). The Elders noted that the "feelings expressed during the [February 4 meeting with Hooyer] and the tone of the proposed letter are a concern for us." (*Id.* ¶220).

The Elders tasked Norman Van Mersbergen, an Elder, with composing a response to Hooyer's proposed letter. (C.App.II 137-138, ¶222). In the draft response, Van Mersbergen prepared, he acknowledged Edouard's misconduct. (*Id.*). Van Mersbergen wrote, based on guidance from another pastor the Elders had consulted:

[A] false dichotomy is established when it asserts that all blame is [Edouard's]. The victims are certainly sinned against, but

they are also sinning. All the parties involved failed to walk in the light (I John 1) and the women, though not bearing the same degree of responsibility as does [Edouard], were certainly responsible for their behavior and need to be called to repentance for consenting to his advances and for violating their marital covenant. They sinned sexually, even though they can rightly in one sense be denominated as victims of [Edouard]’s machinations.

(C.App.II 138 ¶¶223-224). The Elders discussed the proposed response but never sent it to Hooyer, the Bandstras, or the congregation. (C.App.II 139, ¶226).

On February 23, 2011, the Elders met with Hooyer and explained her proposed letter was not sent because the Elders “felt the concepts she suggested were not necessarily Biblical” (*Id.* ¶228).

The Bandstras Leave the Church

Jason and Valerie left the Church in July 2012. (C.App.II 147, ¶271). Ryan and Anne left the Church in September 2012. (*Id.* ¶272).

The Church and the Bandstras Exchange Letters

On September 19, 2012, the Consistory wrote to the Bandstras. The letter stated, in part:

In our explorations of how to faithfully apply the Word for us individually, as a church, and especially as leaders in the church, we have been convicted by our calling to express forgiveness to you, as our heavenly Father has forgiven us (Matt. 6:14-15; Mark 11:25-26; Eph. 4:32; Jas. 2:13). We want to honor God not only by forgiving you in our hearts, but also

by expressing our conviction for your forgiveness in an official way.

We believe that we expressed that to you when you first came to us and confessed the sin of adultery. Our desire is to be forgiving and to express that forgiveness in the clearest and most unmistakable terms.

(C.App.II 149-150, ¶286).

Also on September 19, 2012, the Bandstras wrote to the Elders setting forth various demands, including a request that the Elders “publicly apologize and vindicate those members of the congregation they directly or indirectly blamed as part of Patrick Edouard’s sexual predatory practices.”

(C.App.II 150, ¶288).

The Consistory Statement

On December 10 and 11, 2012, a statement the Consistory prepared was read to the congregation. (C.App.II 158, ¶337). The Consistory stated that, throughout these events, it sought to “faithfully serve the church and our Lord.” (SUMF 338). The Consistory stated Edouard “misused his sacred office in order to lead vulnerable members into sin.” (C.App.II, ¶338). The statement continued:

Defining the manipulation in which [Edouard] engaged has caused debate among us, as elders. However, we recognized the adulterous nature of his sin, and we all recognize that he misused his office in a grievous way.

* * *

In characterizing the actions of [Edouard] as predatory, we don't mean to imply that he alone committed sin. God calls i[t] sin when someone who is married willingly has intimate relations with a person who is not their spouse, and we have learned that other members rejected the manipulations of a man who never should have sought to lead them astray. We are also thankful that those who were manipulated brought [Edouard]'s actions to light, ensuring that it would be stopped.

* * *

Finally we note that some members of the congregation urged us to have a Christian counselor come and speak with the congregation. In response, we contacted several such counselors. Not knowing these counselors personally, the Consistory sought to ensure that they would not deepen our divisions or introduce unbiblical teachings. However, none of these counselors were willing to come, in some cases because of the situation's complexity and in some cases because they were uncomfortable with the concerns expressed by the Consistory.

(C.App.II 158-159, ¶339).

Argument

Division I: More than two years before they filed their petition, Plaintiffs had inquiry notice of the Church's alleged failure to prevent Edouard's conduct. The District Court correctly applied the two-year statute of limitations and dismissed these claims.

A. Error preservation.

Plaintiffs failed to properly raise their argument that the continuing violations doctrine tolls the limitations period on Plaintiffs' negligence claims based on the Church's alleged failure to prevent Edouard's conduct.

Therefore, error has not been preserved on this issue. The Church agrees Plaintiffs preserved error on their other arguments.

In its summary judgment motion, the Church argued certain negligence claims were barred by the statute of limitations in Iowa Code section 614.1(2). Plaintiffs responded with a number of arguments, but did not argue that the continuing violations doctrine should apply. (C.App.II 416-485). On June 7, 2016, the District Court granted the Church's summary judgment motion. (*Id.* 654-660).

On June 20, 2016, Plaintiffs filed a Rule 1.904(2) motion and argued the continuing violations doctrine should apply. (C.App.II 661-668). On June 23, 2016, Plaintiffs filed their notice of appeal and moved the Court for a limited remand to allow the District Court to consider their Rule 1.904(2) motion. On August 11, 2016, the Court granted that motion. On September 21, 2016, the District Court denied the Motion to Reconsider. (C.App.II 866-871).

A party resisting a motion for summary judgment fails to preserve error on an issue if the party does not raise the issue in the resistance. *Vande Kop v. McGill*, 528 N.W.2d 609, 613 (Iowa 1995). A Rule 1.904(2) motion may be used to preserve error and request that a court rule on "an issue, claim, defense, or legal theory properly submitted to it for adjudication."

West Branch State Bank v. Gates, 477 N.W.2d 848, 852 (Iowa 1991); *see also Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012) (holding motions to reconsider are only appropriate “[w]hen a district court fails to rule on an issue properly raised by a party”); *State Farm Mut. Auto. Ins. Co. v. Pfibsen*, 350 N.W.2d 202, 206-207 (Iowa 1984) (same). Because Plaintiffs first raised the continuing violations doctrine in their Rule 1.904(2) motion rather than in their Resistance, that issue was not preserved for review.

B. Standard of review.

The Court reviews summary judgment motions for correction of errors at law. *Green v. Racing Ass’n of Central Iowa*, 713 N.W.2d 234, 238 (Iowa 2006).

C. Valerie and Anne had inquiry notice of their negligence claims based on the Church’s alleged failure to prevent Edouard’s conduct more than two years before they filed their claims.

The statute of limitations for personal injury claims is two years. Iowa Code § 614.1(2). On December 7, 2012, Valerie and Anne filed their Petition and alleged negligence claims based on the Church’s alleged failure to prevent Patrick Edouard’s conduct. Jason and Ryan alleged derivative negligence claims based on the same conduct. (*See* C.App.II 654). The District Court dismissed these claims. It concluded the undisputed facts, discussed below, showed Valerie and Anne knew or should have known

about the Church's alleged failure to prevent Edouard's conduct more than two years before they filed their petition. (C.App.II 654-659; 866-871).

1. Valerie was aware of Edouard's misconduct more than two years before she filed her negligence claim.

Valerie contends that Edouard had sexual intercourse with her against her will in early 2006. (C.App.II 112-113, ¶¶66-71). Valerie testified that at the time of this incident, she believed she had been raped by Edouard and that his actions were wrong. (*Id.* ¶72).

In October 2009, Zylstra told Valerie that Edouard had once tried to kiss her. (C.App.II 116 ¶93). Upon learning this, Valerie realized that Edouard was abusing her. (C.App.II 116-117, ¶¶95-97). She testified that at this point, she “really knew in my gut that what he was doing.” (*Id.*).

Indeed, Valerie testified she realized at that time—October 2009—that Edouard was using his position and trust as a pastor to “recruit” women for the “very purpose of abusing them.” (*Id.*). Valerie realized in October 2009 that Edouard's conduct was “more than wrong” and was a “pattern” in which Edouard's intent was to sexually abuse women. (*Id.*). Valerie testified,

Q. When you had this conversation with your sister Patty Zylstra in October 2009, did you realize at that time that what Patrick Edouard was doing really wasn't counseling?

A. No, that's not true. What I realized was that he was using his pastoral position and basically the trust that people put in him as a pastor to counsel and to basically recruit women to be

counseling candidates so he could get them into a position of trust and vulnerability for the very purpose of abusing them.

(App.I 155-156).

Valerie contacted Edouard in October 2009, accused him of clergy sexual abuse “in so many words,” and broke off all communication with him. (C.App.II 117, ¶98).

In April 2010, several months after discovering Edouard’s abuse, Valerie sought counseling. (*Id.* ¶103). In May 2010, Valerie reported to her counselor that she had inappropriate contact with Edouard and that “a lot of the problems [she] was experiencing were related to” Edouard. (C.App.II 118, ¶104). Valerie concedes that her counseling in 2010 was related to the mental distress she experienced as a result of her sexual contact with Edouard. (*Id.* ¶107). Her counselor confirmed the counseling she provided to Valerie starting in April 2010 was all related to Edouard’s sexual exploitation of her. (*Id.* ¶108).

Despite these facts, Plaintiffs did not file their Petition until December 7, 2012—six years after Edouard allegedly raped Valerie, more than three years after Valerie realized that Edouard had abused her, and well more than two years after Valerie sought counseling as a result of her inappropriate contact with Edouard. (*See* C.App.I 210).

2. Anne was aware of Edouard’s misconduct more than two years before she commenced this action.

Edouard and Anne engaged in sexual intercourse and continued to do so approximately once each week between May 2008 and December 10, 2010—a period of approximately two and a half years. (C.App.II 121, ¶¶132-133). Anne admits that from the time of her first sexual contact with Edouard, she knew that it was “wrong” and “inappropriate.” (C.App.II 122, ¶135).

In May 2010, Edouard revealed to Anne that he had sexual relations with two other members of the Church, including Valerie and Sandy Kanis, and that he had kissed Valerie’s sister. (*Id.* ¶136). Anne knew at the time that Edouard had been providing counseling to Valerie. (*Id.* ¶137). Edouard also told Anne that he had been providing counseling to Sandy and Patty. (*Id.* ¶138). Upon learning of Edouard’s sexual relations with multiple other women in May 2010, Anne acknowledged that she “started putting all the pieces together very quickly.” (*Id.* ¶139).

In summary, Anne admits that she knew—from the very outset—that her sexual contact with Edouard was “wrong” and “inappropriate.” (*Id.* ¶139). This understanding endured throughout her sexual relationship with Edouard and after she learned about his relationship with other women from the Church whom Edouard was counseling. Yet, Anne did not file the

Petition until more than two years after she learned of Edouard's relationships with other women he was counseling and she put all the pieces together.

3. The District Court correctly applied the inquiry notice standard to the undisputed facts and concluded Valerie and Anne's claims were barred by the statute of limitations.

The District Court applied Iowa's well-settled inquiry notice standard to these undisputed facts. (*See* C.App.II 866-871). Inquiry notice arises when "the injured person has actual or imputed knowledge of all the elements of the action." *Franzen v. Deere & Co.*, 377 N.W.2d 660, 662 (Iowa 1985) (citation omitted). "It is sufficient that the facts would support a cause of action. It is not necessary that the person know they are actionable." *Id.*; *see also Hegg v. Hawkeye Tri-Cnty. REC*, 512 N.W.2d 558, 559 (Iowa 1994).

The District Court held Valerie and Anne knew of the alleged breach of duty by the Church "or would have been able to discover that fact on reasonable investigation of their own abuse at Edouard's hand . . . far more than two years before this suit was filed." (*See* C.App.II 866-871). The District Court correctly dismissed these claims. *See id.*; Iowa Code § 614.1(2).

D. Plaintiffs' suggestion to adopt new legal standards for their specific type of harm would require the Court to depart from years of precedent that contradicts their position.

Tellingly, Plaintiffs do not argue the District Court relied on disputed facts in reaching its conclusion. Instead, they argue the psychological effects of Edouard's conduct prevented them from taking legal action within the two-year limitations period in Iowa Code section 614.1(2). Pl. Br. 17. They also argue that the District Court erred in refusing to adopt a novel cumulated wrongs theory of the continuing violations doctrine, which they believe should toll the accrual of these claims. Pl. Br. 29. These arguments fail because they are at odds with Iowa law.

1. The Court has rejected previous attempts to create special claim accrual rules for psychological effects of a personal injury.

Plaintiffs challenge the common law exception to the statute of limitations, the discovery rule, and ask the Court to craft a modified standard to accommodate their claims. Pl. Br. 13-28. They contend the psychological effects of Edouard's conduct, including post-traumatic stress disorder ("PTSD"), prevented them from understanding they were victims in a

“systematic” sexual abuse scheme perpetrated by Edouard, so a delayed inquiry notice should apply.⁴ Pl. Br. 20-22.

The discovery rule is the common-law exception to the statute of limitations. *Borchard v. Anderson*, 542 N.W.2d, 247, 250 (Iowa 1996). It provides that a cause of action does not accrue until the plaintiff has discovered the injury or by exercise of reasonable diligence should have discovered it. *Id.* (citing *Chrischilles v. Griswold*, 150 N.W.2d 94, 100 (Iowa 1967)). “A party is placed on inquiry notice when a person gains sufficient knowledge of facts that would put that person on notice of the existence of a problem or potential problem.” *Buechel v. Five Star Quality Care Inc.*, 745 N.W.2d 732, 736 (Iowa 2008) (citing *Sparks v. Metalcraft, Inc.*, 408 N.W.2d 347, 352 (Iowa 1987)). “On that date, a person is charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation,” and “[o]nce a person is aware that a problem exists, the person has a duty to investigate ‘even though the person may not have knowledge of the nature of the problem that cause the injury.’” *Buechel*, 745 N.W.2d at 736 (quoting *Sparks*, 408 N.W.2d at 352). The District Court applied this standard. (*See* (C.App.II 654-659; 866-871).

⁴ They argue the operative inquiry notice date should be December 10, 2010, when Anne and Edouard were discovered by Ryan. Pl. Br. at 28.

Plaintiffs’ position—that a different standard should apply to their claims because of alleged psychological effects—conflicts with Iowa law. The Court considered and rejected a similar attempt to erode the discovery rule in *Woodroffe v. Hasenclever*, 540 N.W.2d 45 (Iowa 1995). In *Woodroffe*, the plaintiff claimed she had been sexually assaulted while she was a minor, but did not file her claim until she was forty years old.⁵ *Id.* at 46. The Court held that the plaintiff’s representations about her understanding of the sexual assault she experienced established that she was on inquiry notice of her claims more than two years before she filed her lawsuit. *Id.* She admitted that she had been able to recall the sexual abuse in question many years before the limitations period expired. *Id.* at 47.

The *Woodroffe* plaintiff argued that as she continued treatment, she began to uncover newly-remembered abuse within the statute of limitations period in section 614.1(2), and asked the Court to apply a “rolling statute of limitations” approach, resetting the claim accrual each time a new memory was recalled. *Id.* at 48. The Court declined this approach. It held that even when a plaintiff’s memory surfaces new memories of abuse on an ongoing

⁵ Iowa Code section 614.8A provides that a party who suffered sexual abuse as a child may bring an action “within four years from the time of the discovery by the injured party of both the injury and the causal relationship.” This exception did not apply in *Woodroffe*, however, because the claims accrued before it was enacted. *Woodroffe*, 540 N.W.2d at 46.

basis, the principle of inquiry notice applied and operated to bar her claims. *Id.* at 49-50. The Court reasoned that the plaintiff knew or should have known of facts that gave rise to her tort claim even if she wasn't yet aware of the full extent of the psychological injuries it caused. *Id.* at 48.

The Court examined the interplay of mental health and inquiry notice a year later in *Borchard v. Anderson*, 542 N.W.2d 247, 251 (Iowa 1996). There, the plaintiff filed claims for personal injury arising out of domestic abuse she had suffered. *Id.* She argued, like Valerie and Anne, that she developed PTSD from the abuse. *Id.* Her symptoms included amnesia, memory suppression, and numbed emotions, following a prolonged period of abuse. 542 N.W.2d at 250. She claimed her PTSD prevented her from becoming aware of any injury from the domestic abuse when it occurred, so she didn't file her case until twelve years later. 542 N.W.2d at 250. The Court recognized that while repressed memories may serve to toll the statute of limitations, the *Borchard* plaintiff had understood the wrongfulness of her husband's conduct at least twelve years before she filed her claim—well past the two-year limitations period. *Id.*

Like Valerie and Anne, the *Borchard* plaintiff suggested that “she did not understand the causal connection between” the tortious conduct “and her emotional difficulties until a number of years later.” *Borchard*, 542 N.W.2d

at 250. The Court rejected this argument. *Id.* at 251 (citing *LeBeau v. Dimig*, 446 N.W.2d 800, 802 (Iowa 1989)). It concluded that lingering effects from the plaintiff's PTSD did not exempt her from the statute of limitations because "she may not have known medically why and how this abuse had and still does affect her," but the law "does not require such knowledge; the law requires only that she be aware of the existence of a problem." *Borchard*, 542 N.W.2d at 251 (citing *Langner v. Shannon*, 533 N.W.2d at 511, 518 (Iowa 1995)). The Court also expressly declined to "create a special exception to the statute of limitations for PTSD." *Borchard*, 542 N.W.2d at 251.

The Iowa Court of Appeals reached a similar result in *Steinke v. Kurzak*, 803 N.W.2d 662, 670 (Iowa Ct. App. 2011). *Steinke* reversed a district court's denial of summary judgment, holding section 614.1(2) applied and barred the plaintiff's claim. *Id.* The Court of Appeals reasoned that because the plaintiff could make no claim of repressed memories of sexual abuse due to claimed PTSD, he had failed to "employ the vigilance the law required of him to investigate the cause of his injury" at the time of the abuse. *Id.* at 671. Similarly, in *Frideres v. Schiltz*, the Eighth Circuit Court of Appeals applied Iowa Code section 614.1(2) and concluded the plaintiff had enough knowledge linking her abuse and injuries to put her on

inquiry notice of her personal injury claim more than two years before filing suit. 113 F.3d 897, 899 (8th Cir. 1997).

Like all the plaintiffs who had inquiry notice in these cases, Valerie and Anne clearly understood Edouard's conduct was "a problem" more than two years prior to filing their case, which triggered their inquiry notice. Valerie and Anne maintained vivid recollections of their encounters with Edouard throughout their entanglements with him. (C.App.II 113, ¶72; 121, ¶¶130-132; 122, ¶135). They have not claimed any mental health condition caused them to repress their memories, only that it created some kind of psychological effect that prevented them from taking action sooner. They have not presented any facts to dispute that they were "aware of the existence of a problem" with Edouard's conduct more than two years before they filed their petition. *Borchard*, 542 N.W.2d at 251. Indeed, Valerie and Ann acknowledged that they knew Edouard's sexual conduct was wrong, or a "problem" from the outset. Valerie knew Edouard was using his position and trust as a pastor to "recruit" women for the "very purpose of abusing them," knew that it was a "pattern," accused Edouard of "clergy sexual abuse," and sought counseling well outside the two years before this lawsuit was commenced. These facts mandated dismissal of their claims. *See*

Woodroffe, 540 N.W.2d at 45-49; *Borchard*, 542 N.W.2d at 250; *Steinke*, 803 N.W.2d at 670; *see also Frideres*, 113 F.3d at 899.

Plaintiffs' psychological effects theory would also undermine the purpose of the statute of limitations: to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Wetter v. Dubuque Aerie No. 568 of the Fraternal Order of Eagles*, 588 N.W.2d 130, 132 (Iowa Ct. App. 1998) (citing *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965)). Inquiry notice is rooted in the concept of fairness, but not exclusively for a plaintiff's benefit: "While fairness to a plaintiff provides justification for the discovery rule, we believe fairness to a defendant must temper the application of the rule." *Woodroffe*, 540 N.W.2d at 49 (citations omitted). "The discovery rule has been adopted to ameliorate the harsh results of a statute of limitations when the injury was unknown and basically unknowable." *Doe v. Cherwitz*, 518 N.W.2d 362, 365 (Iowa 1994). The Court has refrained from modifying the discovery rule when doing so would "seriously erode" a defendant's reasonable expectations in liability exposure. *Woodroffe*, 540 N.W.2d at 49. This case should be no exception to the rule. The Church, like other defendants, had a

reasonable expectation in the liability exposure limitations in section 614.1(2).

The District Court held that Valerie and Anne “were fully aware that what was going on was wrong in sufficient time to bring their action within the statute of limitations.” (*See* C.App.II 654-659; 866-871). That is all that is required. The District Court properly dismissed their claims.

2. Plaintiffs’ attempt to end-run the statute of limitations through a novel continuing violations theory is unsupported by Iowa law.

Plaintiffs also urge the Court to adopt a new “cumulated wrongs” theory of the continuing violations doctrine. They characterize this as “an equitable exception to the usual rules governing statute of limitations periods, [when] the statute is tolled so long as the tortfeasor perpetuates his or her misconduct.” Pl. Br. at 31. Plaintiffs argue that if this theory were adopted it would mean that their negligent supervision claims against the Church did not accrue until they removed themselves from the Church in July 2012 (for Valerie and Jason) and September 2012 (for Anne and Ryan). Pl. Br. at 31.

The cumulative wrongs continuing violations doctrine is not the law in Iowa. As the District Court noted in its rejection of Plaintiffs’ argument, “the legislature is capable of writing an exception into a limitations statute.”

(C.App.II 868). There are a number of notable exceptions to the statute of limitations, including exceptions for plaintiffs who are minors, who have mental illnesses, or who experience sexual abuse while a minor. *See* Iowa Code § 614.8 & 614.8A. The legislature has not created an exception for clergy abuse or “psychological effects” of sexual abuse. *See* Iowa Code §§ 614.1-614.28. “Legislative intent” on the statute of limitations “is expressed by omissions as well as inclusions.” *Borchard*, 542 N.W.2d at 251 (citing *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995)). By not including exceptions for clergy abuse or “psychological effects” of sexual abuse, the legislature has expressed its intent that there be no exception. *See id.* The solution Plaintiffs seek—a different statute of limitations for their specific type of personal injury—is a legislative one. The Court’s adoption of their position would encroach on the legislature’s province. *See Borchard*, 542 N.W.2d at 251 (citing *In re Marriage of Wessels*, 542 N.W.2d at 491). It must be rejected.

Plaintiffs erroneously argue the Court previously applied the continuing violations doctrine in *Breiner v. Nugent*, 111 N.W. 446 (Iowa 1907). The portion of the opinion on which Plaintiffs rely was dicta and expressed only an observation of what “some of the cases” from other states have held. *Id.* Furthermore, the seduction claim in *Breiner* entailed a

continuing sexual relationship between the parties, not a negligent supervision or retention claim against the employer of a tortfeasor. *See id.* Therefore, any relevance *Breiner* has in this analysis limited to direct claims Anne and Valerie alleged against Edouard, the individual who perpetrated the abuse. But, Plaintiffs dismissed their direct claims against Edouard as well as their vicarious liability claims against the Church that were predicated upon Edouard's conduct. *Breiner* does not apply. *See Buszka v. Iowa City Cmty. Sch. Dist.*, No. 16-0011, 2017 WL 512487, at *5 (Iowa Ct. App. Feb. 8, 2017) (explaining that statutory exception for torts against school employees who commit sexual abuse does not extend to the employer school district).

The only other context in which the Court applied the continuing violations doctrine is for statutory hostile work environment claims under the Iowa Civil Rights Act. *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 528-29 (Iowa 1990). Two other cases Plaintiffs cite in support of their position, *O'Rourke v. City of Providence*, 235 F.3d 713, 730 (1st Cir. 2001) and *EEOC v. J.W. Mays, Inc.*, No. 88CV3020, 1989 WL 106890, at *2 (E.D.N.Y. Sept. 13, 1989) applied the continuing violations theory to federal statutory employment discrimination claims. Another case they cite, *Page v. United States*, 729 F.2d 818, 822 (D.C. Cir.

1984) applies cumulated wrongs theory under the federal Tort Claims Act. Because Plaintiffs pled negligence claims, these cases do not apply.

Finally, Plaintiffs cite *Callahan v. State*, 464 N.W.2d 268 (Iowa 1990), arguing that “victims of sexual abuse by a professional counselor cannot ‘inquire’ into the harm while they are still under control of the abuser. Pl. Br. 29-30. This misstates the holding in *Callahan*, which involved a minor’s claims for sexual abuse against the State of Iowa under the Tort Claims Act. *Id.* at 269. *Callahan* held the claim accrued when the minor’s mother developed inquiry notice of his claim, not when the minor developed notice, and reversed the district court on that basis. *Id.* at 273. *Callahan* recognized its holding created a narrow discovery rule exception for a minor’s sex abuse claim under the Tort Claims Act. *Callahan* reasoned this exception was consistent with public policy because the Tort Claims Act did not contain an express statute of limitations exception for child sex abuse, but the statute of limitations in Iowa Code Section 614.8A did. *Id.*

Callahan has no application. Valerie and Anne’s claims are governed by Iowa Code section 614.1(2), not the Tort Claims Act. Section 614.1(2) is subject to the express statutory exceptions the Iowa legislature crafted in Chapter 614, and Valerie and Anne do not argue any exception applies. And, unlike the plaintiff in *Callahan*, Valerie and Anne were not minors during

their sexual encounters with Edouard; they were intelligent adult women who fully grasped the nature of Edouard's conduct with them as it occurred more than two years before they filed their claim. Their continuing violations theory should not apply.

E. Dismissal of the negligence claims based on the Church's alleged failure to control Edouard's behavior is also appropriate because they are barred by the First Amendment.

Plaintiffs' negligence claims based on the Church's alleged failure to prevent Edouard's conduct are also barred by the First Amendment. The District Court did not reach this issue because it correctly dismissed these claims as time-barred. The Court may elect to affirm summary judgment on this alternate basis. *Kern v. Palmer Coll. of Chiropractic*, 757 N.W.2d 651, 662 (Iowa 2008).

Plaintiffs allege the Church negligently supervised and retained Edouard as a pastor and counselor. (*See* C.App. 277-292). Evaluating these claims would require the factfinder to assess Edouard's competence as a pastor for the church. *See, e.g., Godar v. Edwards*, 588 N.W.2d 701, 708 (Iowa 1999). This inquiry necessarily intrudes on the First Amendment rights of a religious organization to select and retain its clergy, which is forbidden. *See Doe v. Hartz*, 52 F. Supp. 2d 1027, 1078 (N.D. Iowa 1999) (holding a negligent hiring claim against a church was barred by the

Constitution despite allegations that the clergy member had sexually abused the plaintiff).

Hiring and retaining clergy “necessarily involve interpretation of religious doctrine, policy, and administration. Such excessive entanglement between church and state has the effect of inhibiting religion, in violation of the First Amendment.” *Gibson v. Brewer*, 952 S.W.2d 239, 246-47 (Mo. 1997) (internal citations and quotations omitted). *See also Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780, 790 (Wis. 1995) (affirming dismissal of a negligent hiring claim about what makes one competent to serve as a Catholic priest based on the First Amendment); *J.M. v. Minn. Dist. Council of Assemblies of God*, 658 N.W.2d 589, 594-95 (Minn. Ct. App. 2003) (parishioner’s negligent hiring claim arising out of alleged sexual abuse during counseling with pastor was barred by the First Amendment); *Isely v. Capuchin Province*, 880 F. Supp. 1138, 1150 (E.D. Mich. 1995) (affirming dismissal of negligent hiring and retention claims about a priest “necessarily would involve prohibited excessive entanglement with religion”). Because second-guessing the Church’s religious reasons for retaining Edouard would violate the First Amendment, these claims are not actionable.

A similar analysis applies to a claim for negligent supervision. *See Pritzlaff*, 533 N.W.2d at 791 (negligent supervision claims against a religious institution are “nonetheless prohibited by the First Amendment under most if not all circumstances”); *Gibson*, 952 S.W.2d at 247 (assessing reasonableness of church’s supervision would cause excessive entanglement and “result in the endorsement of one model of supervision”).

Adjudicating the merits of Plaintiffs’ claims would force the Court or jury to make “after the fact” determinations and “sensitive judgments” about the propriety of the church’s actions in light of the Church’s religious beliefs. *Pritzlaff*, 533 N.W.2d at 791 (quoting *Schmidt v. Bishop*, 779 F. Supp. 321, 332 (S.D.N.Y. 1991)). This would be inappropriate. *Gibson*, 952 S.W.2d at 247.

Division II: The District Court properly dismissed Plaintiff’s claims that the Church negligently exercised its religion following the disclosure of Edouard’s conduct.

A. Error preservation.

The Church agrees Plaintiffs preserved error on the arguments raised in their opening brief.

B. Standard of review.

The Court reviews summary judgment motions for correction of errors at law. *Green*, 713 N.W.2d at 238.

C. Asking the Court to second-guess the Church's actions, which were premised on its understanding of scripture, sin, and forgiveness, is anathema to the First Amendment and Iowa Constitution, Article I, Section 3.

There is no question Plaintiffs were unhappy with the Church's response to Edouard's sexual misconduct. Their criticism arises from their disagreement with the Church's religious understanding of sin and forgiveness. Plaintiffs disagree that they committed sin. Plaintiffs disagree they need forgiveness. Plaintiffs disagree with the Church's interpretation of the Bible. Plaintiffs disagree with the Church's decision to provide or not provide certain information to the congregation. And Plaintiffs disagree with the Church's decision to rely on the Elders' interpretation of scripture over the views of Plaintiffs' preferred "experts" on clergy sexual abuse. *See* Pl. Br. at 13. These perceived slights and complaints boil down to a single theory: negligent Christianity.

The Court has "a constitutional mandate to protect the free exercise of religion in Iowa[.]" *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009) (citing Iowa Const. art. I, § 3 ("The general assembly shall make no law . . . prohibiting the free exercise of religion")). "This mission to protect religious freedom is consistent with [the Court's] task to prevent government from endorsing any religious view." *Id.*

Plaintiffs pay lip service to the sacrosanct status of religious beliefs. *See* Pl. Br. at 40. Yet, they reject the notion that the First Amendment⁶ protects a church from second-guessing by a court about its religious views and practices. *See* Pl. Br. at 12-15. Plaintiffs offer no legal authority to support this position, likely because case law in other jurisdictions reaches the opposite conclusion. For example, in *Franco v. The Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198 (Utah 2001), the Utah Supreme Court held a church's direction to a congregant to "forgive, forget, and seek Atonement" in response to abuse from a fellow church member amounted to a clergy malpractice claim that was barred by First Amendment. 21 P.3d at 204-205. In *Bladen v. First Presbyterian Church of Sallisaw*, 857 P.2d 789 (Okla. 1993), a married couple sued their church after the preacher initiated an adulterous affair with the wife. *Id.* at 790. The wife claimed that the church was liable because it "did not provide marital counseling to help her and her husband after the affair was discovered." *Id.* at 797. The court had no trouble disposing of such a claim on First Amendment entanglement grounds. *Id.*

⁶ The Church relies on both the First Amendment of the United States Constitution and Article I, Section 3 of the Iowa Constitution. The Church uses the term "First Amendment" in reference to both the United States and Iowa Constitutions.

A similar result was appropriate here. The Elders are the Church's governing body. (C.App.II 101, ¶4). They watch over the congregation as a spiritual matter, to "encourage them, exhort them, and warn them." (C.App.II 102, ¶8). They Elders are looked upon to interpret scripture and the Bible and apply it to the congregation. (C.App.II 102-103, ¶¶9-10). The Elders are responsible for admonishing or disciplining members of the congregation who fall short of the Church's teachings and beliefs; members are expected to submit to this admonishment and discipline. (C.App.II, 103, ¶¶11, 14).

Plaintiffs take issue with the spiritual direction and advice the Elders gave after Edouard's conduct was discovered precisely the type of conduct the First Amendment is intended to protect.

The District Court recognized these claims for what they were—an attempt to infringe on the Church's exercise of its religion—and held they were barred by the First Amendment. (C.App.II 654-659). This decision must be affirmed.

Division III: The District Court properly dismissed Plaintiffs' defamation claims because the alleged defamatory statements were subject to a qualified privilege, were protected opinion, or were not published.

A. Error preservation.

The Church agrees that Plaintiffs preserved error on the arguments raised in their opening brief.

B. Standard of review.

The Court reviews summary judgment motions for correction of errors at law. *Green*, 713 N.W.2d at 238.

C. Intra-congregational discussions about the Church's religious and spiritual management of the aftermath of Edouard's conduct is subject to a qualified privilege.

Plaintiffs originally based their defamation claim on over a dozen alleged defamatory statements. (*See* C.App.I 287-288, ¶116). The District Court granted summary judgment on all alleged statements. In this appeal, Plaintiffs confine their argument to statements the Board of Elders made in a letter dated January 20, 2011, a statement the Elders read to the congregation on December 10 and 11, 2012, and a statement by Hettinga. Pl. Br. at 37-39. Because Plaintiffs have not briefed the legal analysis for the other alleged statements, they have waived argument on them. *Hubby v. State*, 331 N.W.2d 690, 694 (Iowa 1983).

In the January 14, 2011 letter, the Elders advised the congregation there had been “sexual immorality and/or inappropriate contact” between Edouard and “multiple women congregant members,” and urged the congregation to demonstrate “forgiving love” to these members. (App.I 22). Nearly a year later, the Consistory authored a statement that was read to the congregation in services on December 10 and 11, 2012. (C.App.I 13-15). The statement provided: “God calls [it] sin when someone who is married willingly has intimate relations with a person who is not their spouse.” (*Id.* at 14).

These statements were exchanged by Church leadership with the Church’s congregation and were directly related to the Church’s views on the conduct of Church members. Under these facts, the qualified privilege applies and the District Court correctly dismissed their claims.

1. The general rule that protects intra-congregation communication about sin and forgiveness applies.

The “general rule” in Iowa is that “communications between members of a religious organization concerning the conduct of other members or officers in their capacity as such are qualifiedly privileged.” *Kliebenstein v. Iowa Conference of United Methodist Church*, 663 N.W.2d 404, 406-07 (Iowa 2003) (quoting 50 Am.Jur.2d *Libel & Slander*, § 340, at 663 (1995)). These intra-congregation communications are privileged because members

of religious associations share a “common interest” that warrants the protection of “communications between them in furtherance of their common purpose or interest.” *Id.*

Marks v. Estate of Hartgerink, 528 N.W.2d 539 (Iowa 1995) is instructive. In *Marks*, a former member of a church brought defamation claims against church officials based on statements made about him in a letter. 528 N.W.2d at 543. The Court affirmed summary judgment in favor of the church officials and explained:

We believe it is appropriate to apply a qualified privilege to statements made in the context of a church disciplinary proceeding. The May 31 letter constituted formal disciplinary charges against Marks. The statements in the letter were made by a church elder who had a duty imposed by the church to look after the spiritual well-being of the church members.

Marks, 528 N.W.2d at 546, *abrogated on other grounds by Barreca v. Nickolas*, 683 N.W.2d 111 (Iowa 2004).

Like *Marks*, the alleged statements here were made by the Church’s Elders to the congregation. The alleged statements concerned the conduct of members of the congregation and its then-pastor. It is undisputed that the Elders act as the Church’s governing body and are responsible for watching over the congregation as a spiritual matter. (C.App.II 102, ¶8). The Elders are charged with interpreting and applying scripture within the congregation and admonishing or disciplining members of the congregation who fail to

observe the Church's teachings or beliefs. (C.App.II 102-103, ¶¶9-12). Thus, just as in *Marks*, the alleged defamatory statements were "made by a church elder who had a duty imposed by the church to look after the spiritual well-being of the church members." 528 N.W.2d at 546; *see also* Restatement (Second) of Torts § 596 cmt. e (privilege protects statements concerning the "alleged misconduct of some other member" of a religious association). Because the alleged statements here were confined to Church matters and were communicated to Church members, they are protected by the qualified privilege.

2. Plaintiffs' excess publication argument is unsupported and ignores dispositive case law.

Plaintiffs contend the Church forfeited the qualified privilege because one of the letters the Elders distributed to the congregation "made it into the local news media due to their careless distribution of letters containing defamatory statements to the entire congregation," and "the "whole town knew and commented on the behavior of the women." Pl. Br. at 39 & 42.

Plaintiffs have not generated evidence that the Elders distributed the letter or statements to anyone outside the congregation. That point matters. The letter in *Kliebenstein* was published to both members of the congregation and to members of the community at large. 663 N.W.2d at 406-407. The Court held that if the letter had "been divulged solely to

members” of the defendant church, the defamation claim would have failed. *Id.* *Kliebenstein* makes clear that the Elders’ distribution of alleged defamatory statements to congregation members is conduct that falls within the qualified privilege. Plaintiffs’ speculation that other individuals may have learned about the letter’s content is insufficient to defeat summary judgment. Iowa R. Civ. P. 1.981(3); *Hlubek v. Pelecky*, 701 N.W.2d 93, 96 (Iowa 2005).

3. Plaintiffs’ contention that actual malice removes the alleged statements from the qualified privilege asks the Court to ignore the undisputed facts and *Kliebenstein*.

Plaintiffs argue the qualified privilege should not apply because Defendants published the alleged statements with “actual malice.” Pl. Br. at 44-46. Plaintiffs argue malice exists because, when the Church referred to Valerie and Anne’s conduct as adultery, it implied Valerie and Anne’s sexual conduct with Edouard was consensual. In support of this position, Plaintiffs cite *State v. Edouard*. *See id.* For the reasons stated in Division III, the secular criminal proceedings have no bearing on whether the Church can rely on the Bible and Church doctrine to view their conduct as adultery. Regardless, Plaintiffs may not use these criminal proceedings to disprove that the Church exercised its First Amendment right by viewing their conduct as adultery. *Kliebenstein*, 663 N.W.2d at 406-407. The evidence

shows nothing but the Elders' sincerely-held religious belief, protected by the First Amendment, about the moral conduct of its members. There is no evidence of actual malice.

D. Opinions voiced by Elders about the morality of Valerie and Anne's sexual conduct with Edouard is protected by the First Amendment.

Plaintiffs take issue with the District Court's conclusion that the Church's statements were protected opinions. Plaintiffs erroneously claim that the District Court ruled the alleged defamatory statements "were all opinions." Pl. Br. 46. This misstates the holding. The District Court only addressed the opinion question with respect to alleged statements by Hettinga to Plaintiffs and others: that Anne and Valerie were "not victims" and "Unless he was holding a knife to her throat, it wasn't rape." (*See* C.App.II 648-650).

Statements of opinion are protected by the First Amendment. *See Kiesau v. Bantz*, 686 N.W.2d 164, 177 (Iowa 2004), overruled on other grounds by *Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699 (Iowa 2016)). A statement of opinion can form the basis of a defamation claim only if it implies a "provable false fact" or relies upon "stated facts that are provably false." *Yates v. Iowa W. Racing Ass'n*, 721 N.W.2d 762, 771 (Iowa 2006) (quotation omitted).

Plaintiffs, seeking to identify some “verifiably false” statement in Hettinga’s statement, point to Edouard’s conviction for sexual exploitation as a counselor. That conviction, however, resulted from a trial held in August 2012—long after the statements were allegedly made. *See Edouard*, 854 N.W.2d at 430-31. Plaintiffs acknowledge Hettinga’s statement was allegedly made in “early 2011,” long before Edouard’s criminal trial and conviction. (C.App. 139, ¶230; 140, ¶236). Notably, Edouard was acquitted of sexual abuse charges. *See Edouard*, 854 N.W.2d at 431. Thus, there is no basis to say that this statement was a “provable false fact” or “objectively capable of proof or disproof” at the time they were made. *Yates*, 721 N.W.2d at 771. The District Court also observed that while Hettinga’s attitude toward sexual assault may be dated or inconsistent with the views of various advocacy groups, “persons with [Hettinga]’s attitudes still exist because it is not possible to prove objectively either position.” (*See C.App.II* 649). Hettinga’s statement was a protected opinion.

E. Alternatively, the Court may affirm the District Court’s order by finding Plaintiffs are unable to prove various other elements of their defamation claims.

The District Court did not reach all the theories Defendants advanced in support of dismissal of the defamation claims. The Court may affirm the

District Court's holding on these alternate arguments. *See Kern*, 757 N.W.2d at 662.

1. The majority of the alleged defamatory statements are protected opinions.

The alleged defamatory statements are opinions. The statements in question consist of indefinite, highly subjective, and, Biblical concepts about sin, forgiveness, temptation, and repentance. These types of determinations of fault are “very slippery,” imprecise, and are not susceptible to precise meaning. *Bruning v. Carroll Cmty. Sch. Dist.* No. C04-3091-MWB, 2006 WL 1234822, at *17 (N.D. Iowa May 3, 2006) (holding that “imprecise, unverifiable” statement that “girls were as much at fault” for alleged sexual abuse was non-actionable opinion). Because the Church's statements are not “objectively capable of proof or disproof” and do not have any “precise core of meaning.” *Yates*, 721 N.W.2d at 770, they cannot be the basis of an actionable defamation claim. *See Kern*, 757 N.W.2d at 662.

2. Plaintiffs cannot prove the alleged statements are false without entanglement with the First Amendment.

An essential element of any defamation claim is a false statement. *See, e.g., Kennedy v. Zimmerman*, 601 N.W.2d 61, 64 (Iowa 1999) (“The basis of both [libel and slander] involve[s] the publication of an untrue statement which injures a person's reputation.”). Defamation claims are

barred by the First Amendment “when an examination of the truth of the allegedly defamatory statements would require an impermissible inquiry into church doctrine and discipline.” *Kliebenstein*, 663 N.W.2d at 407 (quoting 50 Am.Jur.2d Libel & Slander § 117, at 420 (1995)).

The allegedly defamatory statements here, by their very nature, would require an inquiry into church doctrine about temptation, forgiveness, immorality, repentance, sin, and adultery. Attempting to discern truth or falsity in these statements would run afoul of the First Amendment. The First Amendment does not permit such an inquiry. *See Kliebenstein*, 663 N.W.2d at 407.

3. Many alleged statements about Valerie and Anne committing “sin” in the Church’s eye were substantially true.

The substantial truth of an alleged statement is an absolute defense to a claim of defamation. *Behr v. Meredith Corp.*, 414 N.W.2d 339, 342 (Iowa 1987). A defamation defendant does not have “to establish the literal truth of the publication in every detail so long as the ‘sting’ or ‘gist’ of the defamatory charge is substantially true.” *Id.* The gravamen of Plaintiffs’ claim is that Valerie and Anne were accused of adultery. Both admit to having sexual relations with Edouard while they were married. Valerie also admits to having sexual relations with “Ramiro” while she was married to

Jason. (C.App.119, ¶¶113-115). Anne confessed to the sin of adultery. Similarly, Valerie confessed to the sin of adultery, although she now contends that she confessed to “idolatry.” Valerie and Anne acknowledge that they sinned.⁷ The alleged statements are substantially true based.

Division IV: The District Court correctly held that Plaintiffs may not rely on offensive issue preclusion from *State v. Edouard* to bar Defendants from litigating a host of unrelated legal issues in the instant action.

A. Error preservation.

The Church agrees that Plaintiffs preserved error on the arguments raised in their opening brief.

B. Standard of review.

The Court reviews summary judgment motions for correction of errors at law. *Green*, 713 N.W.2d at 238.

C. Even if the criminal verdict had addressed “consent,” the First Amendment protects and allows the Church to determine how God and their religious beliefs would view the women’s role.

Plaintiffs ask the Court to invoke the doctrine of issue preclusion to bar the Church from litigating a host of issues that were never decided in the criminal case the State brought against Edouard (“*State v. Edouard*”).

⁷ This fact again demonstrates the First Amendment problem with Plaintiff’s defamation claims. The Court is being asked by Plaintiffs to distinguish and parse between “sins.” Apparently, Valerie and Anne would have been satisfied if only the Church had allegedly stated that she had “sinned” in her relationship with Edouard or had committed the “sin of idolatry.”

Primarily, they contend the Church cannot dispute or introduce any evidence that they “consented” to conduct with Edouard or were not “emotionally dependent” on Edouard. Pl. Br. at 54 & 58-59. Plaintiffs presumably intend to argue the Church cannot view Valerie and Anne’s conduct as “adultery” or “sin” because they did not “consent.” However, the First Amendment protects the Church’s right to make its own determination based upon its religious views and convictions despite any criminal conviction. Issue preclusion, therefore, has no impact on the ultimate issues in this case.

D. Plaintiffs cannot meet the elements of issue preclusion.

To apply the doctrine of issue preclusion, Plaintiffs must establish: “(1) the issues concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made in the prior action must have been necessary and essential to the resulting judgment.” *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981); *Fischer v. City of Sioux City*, 654 N.W.2d 544, 548 (Iowa 2002).

1. *State v. Edouard* decided issues related to Edouard’s commission of various crimes in Iowa.

In *State v. Edouard*, the State charged Edouard with three counts of Sexual Abuse in the Third Degree (“Sexual Abuse”), four counts of Sexual

Exploitation by a Counselor or Therapist (“Sexual Exploitation”), and one count of Engaging in a Pattern or Practice of Sexual Exploitation by a Counselor or Therapist (the “pattern or practice claim”). *Edouard*, 854 N.W.2d at 430. Each charge arose out of Edouard’s relationship with a number of female members of the Church. One count of Sexual Abuse and one count of Sexual Exploitation pertained to Valerie, and one charge of Sexual Exploitation pertained to Anne. (C.App.II 296, 303-304).

On the charge of Sexual Abuse, the District Court instructed the jury that the State had to prove two elements: (1) “the defendant performed a sex act with [a victim]; and (2) the specified sex act with Valerie was performed “by force or against [her] will.” (C.App.II 296).

The jury instruction for Sexual Exploitation required the State to prove that: (1) Edouard had engaged in sexual conduct with the victims; (2) Edouard did so “with the specific intent to arouse or satisfy the sexual desires” of himself or Valerie; (3) Edouard was a counselor or therapist as that term is defined under Iowa Code Section 709.15; and (4) the victims were receiving mental health services from Edouard when the sexual conduct occurred or had received mental health services from the defendant within one year prior to the conduct. (*Id.* 301-304). The District Court did not instruct the jury that Edouard’s performance of any sex acts “by force or

against [their] will” was an element of Sexual Exploitation, and did not instruct the jury to consider whether a victim consented to the sexual conduct or whether they were “emotionally dependent” on Edouard. (*See id.*).

The jury instruction for the pattern or practice claim required proof of two elements: (1) that Edouard was guilty of at least two offenses of Sexual Exploitation; and (2) that Edouard had “formed a pattern, practice or scheme to commit the offenses.” (C.App.II 310). The pattern or practice claim did not require proof that Edouard engaged in a sex act by force or against the will of a victim, or that Edouard lacked consent to engage in a sex act with a victim. *See id.*

The jury returned a verdict of not guilty on the all charges of Sexual Abuse. (C.App.II 313-314). That is, the jury acquitted Edouard of charges that required proof that Edouard had engaged in sex acts with the victims without their consent. (*See id.* & 296-297). The jury returned guilty verdicts on all charges of Sexual Exploitation and the pattern or practice claim. (*Id.* 313-315).

2. Because the issues of consent and emotional dependence were not concluded in *State v. Edouard*, the District Court's decision to not apply issue preclusion in this case was appropriate.

The issues of consent and emotional dependence between Anne, Valerie, and Edouard was not decided in *State v. Edouard*. The District Court recognized this and correctly determined it was fatal to Plaintiffs' issue preclusion argument. (See C.App.II 625-628). "The fundamental rationale of collateral estoppel or issue preclusion commands that the doctrine only be applied to matters that have been actually decided." *City of Johnston v. Christenson*, 718 N.W.2d 290, 301 (Iowa 2006) (citation omitted). A criminal conviction can be preclusive to issues raised in a later civil suit if they were "essential to the final judgment of conviction in the criminal case." *Dettmann v. Kruckenberg*, 613 N.W.2d 238, 247 (Iowa 2000). However, an acquittal in a criminal case cannot be used to establish preclusive effect in a subsequent proceeding. Vestal, Issue Preclusion and Criminal Prosecutions, 65 Iowa L. Rev. 281, 335 (1980) (cited favorably by *Dettmann*, 613 N.W.2d 246-247). "[A]n acquittal in the former action serves only to show that the government did not prove beyond a reasonable doubt that the defendant committed the crime." *Id.*

The issue of consent was not an element underlying Edouard's convictions. (C.App.II 301-308 & 313-315). It was an element of Sexual

Abuse, but Edouard was acquitted of those charges. (*Id.* 296-300 & 313-315). For this reason, the issue of consent is not entitled to preclusive effect because it was not “essential to the final judgment of conviction in the criminal case.” *Dettmann*, 613 N.W.2d at 247.

Plaintiffs argue that this Court decided, in *Edouard*, that Valerie and Anne’s relationship with Edouard did not involve full and mutual consent due to Edouard’s abuse of power. Pl. Br. 56. However, the Court did not consider an argument related to the sufficiency of evidence on consent. *See Edouard*, 854 N.W.2d at 443-447. Rather, the Court held that Iowa Code Section 709.15(2) was constitutional as applied because Edouard “occupied a position of power and authority over each of his four victims,” not because there was an absence of consent. *See id.* 445. There is no identity of issues on consent, so issue preclusion cannot apply. *Grant v. Iowa Dep’t of Human Servs.*, 722 N.W.2d at 169, 174 (Iowa 2006).

The issue of Anne and Valerie’s emotional dependence on Edouard was not concluded in *State v. Edouard*, either. Iowa Code Section 709.15(2), the statute under which Edouard was charged, provides alternate methods of proof for the crime of Sexual Exploitation: (1) show sexual conduct “with an emotionally dependent patient or client or emotionally dependent former patient or client;” or (2) show “sexual conduct with a patient or client or

former patient or client within one year of the termination of the provision of mental health services.” Iowa Code § 709.15(2)(b) & (c). The State elected to pursue the latter theory. (C.App.II 301-308). So, there is no identity of issues. *Grant*, 722 N.W.2d at 174.

3. Because the Church had no opportunity to litigate any issue in *State v. Edouard*, the District Court correctly declined to apply issue preclusion.

The Church was not a party to *State v. Edouard*, and, although Valerie and Anne were identified as victims, they were not parties to *State v. Edouard* either. Iowa law typically does not allow offensive use of issue preclusion where the defendants in two actions are not the same or in privity, finding that preclusion would deprive defendants of a full and fair opportunity to litigate. *Gardner v. Hartford Ins. Acc. & Indemn. Co.*, 659 N.W.2d 198, 203 (Iowa 2003) (citation omitted). Courts “scrutinize cases of offensive issue preclusion more closely by examining whether: (1) the party in the second action had a full and fair opportunity to litigate the issue in the first action; and (2) any other circumstances are present which would justify granting the party the opportunity to relitigate those issues.” *Id.* (citing *Harrison v. State Bank of Bussey*, 440 N.W.2d 398, 401 (Iowa Ct. App. 1989)); *see also Aid Ins. Co. v. Chrest*, 336 N.W.2d 437, 439 (Iowa 1983) (refusing to permit issue preclusion); *Harris v. Jones*, 471 N.W.2d 818, 820

(Iowa 1991) (same); *Leavens v. Second Injury Fund of Iowa*, No. 11-1636, 2012 WL 2411684, at *4 (Iowa Ct. App. June 27, 2012) (same).

Plaintiffs cannot point to any facts that showing privity of interest between Edouard and the Church. Instead, Plaintiffs argue that *if* the Church had been named in the criminal trial, its interests *would have* aligned with Edouard's. Pl. Br. at 59. They cite *Dettmann v. Kruckenberg*, to support the application of offensive issue preclusion. In *Kruckenberg*, the Court held that the identity of the defendant driver (a minor), was issue preclusive as to the defendant's father in a subsequent civil action. 613 N.W.2d at 249. The Court observed that the familial relationship, coupled with the parties' shared interest in the vehicle in question, created privity of interest between the minor and his father that satisfied the mutuality concern. *Id.* Here, there is no family relationship or property interest. This case does not meet the mutuality of parties' issue. *See id.* The District Court's ruling should be affirmed.

Division V: The District Court correctly applied the clergy privilege in the instant action.

A. Error preservation.

The Church agrees that Plaintiffs preserved error on the arguments raised in their opening brief.

B. Standard of review.

Whether Iowa Code Section 622.10 applies to the Elders is reviewed for correction of errors at law. *See State v. Richmond*, 590 N.W.2d 33, 34 (Iowa 1999). The standard of review of the application of the privilege to particular communications is for abuse of discretion. *Id.*

C. The Court need not reach the question of the applicability of the clergy privilege if it upholds the District Court's ruling on the negligent Christianity and defamation claims.

The clergy privilege is only relevant, if at all, to Plaintiffs' post December 10, 2010 claims of negligent Christianity and defamation. No documents pertaining to the Plaintiffs or Edouard's interaction with them prior to December 10, 2010, were withheld from production as protected by clergy privilege.⁸ Accordingly, if the Court upholds the dismissal of Plaintiffs' negligent Christianity and defamation claims, there is no need or reason to address the applicability of the clergy privilege.

⁸ When the District Court ruled that all of the minutes of the Board of Elders were to be produced to Plaintiffs, certain portions of those minutes pertaining to privileged communications with or pertaining to other members of the Church were withheld as privileged. However, no communications within the scope of Plaintiffs' initial request for documents pertaining to them or the issues in this case prior to December 10, 2010 were withheld.

D. The clergy privilege applies to communications of the Elders of the Church.

The District Court addressed the role of an Elder in the United Reformed Churches of North America, holding:

The defendant Covenant Reformed Church is a member of the United Reformed Churches of North America. The governing document of the United Reformed Churches places elders and “ministers of the Word” on an equal footing as members of the Consistory. The Consistory “is the only assembly in the church(es) whose decisions possess direct authority within the congregation, since the Consistory receives its authority directly from Christ, and thereby is directly accountable to Christ.” The duties of the “minister of the Word” consist of “continuing in prayer and in the ministry of the Word, administering the sacraments, catechizing the youth, and assisting the elders...” Elders are charged with “continuing with prayer,” “maintain(ing) the purity of the Word and Sacraments,” “assist(ing) in catechizing the youth,” “visit(ing) the members of the congregation according to their needs,” and “engag(ing) in family visiting” among other duties. It appears that their duties are at least co-extensive with those of the “minister of the Word” and in some respects are more expansive. They are specifically charged with visiting members of the church and engaging in family visiting. The court concludes that communications among the elders and with the elders that otherwise meet the elements of the privilege are privileged.

(C.App.I 242-244; 251-252).

The clergy privilege is found in Iowa Code Section 622.10, which provides a privilege for confidential communications to a “member of the clergy.” Iowa Code § 622.10(1). This broad terminology includes ministers, priests, rabbis, and other functionaries of a bona fide religious organization.

See State v. Burkett, 357 N.W.2d 632, 637 (Iowa 1984) (county jail chaplain who was ordained minister and previously served as church pastor); *Reutkemeier v. Nolte*, 161 N.W. 290, 291-93 (Iowa 1917) (holding elders of Presbyterian Church were within meaning of predecessor statute which privileged communications of “minister[s] of the gospel or priest”). In *Reutkemeier*, the Court found it determinative that the elders were “ministers of the gospel” and were chosen to govern the spiritual life of the church. *Id.* Similarly, the duties of the Elders for fall within the scope of communications protected by Section 622.10.

The District Court correctly applied Section 622.10 to communications of the Elders.

E. The District Court did not abuse its discretion in applying the clergy privilege to the communications at issue.

The Church asserted the clergy privilege with respect to a number of matters contained in the minutes of the Elders’ meetings and other communications between the Elders and members of the congregation seeking spiritual and scriptural guidance.

The clergy privilege applies if the communication at issue was: (1) confidential; (2) entrusted to a person in his professional capacity; and (3) necessary and proper for the discharge of the function of the person’s office. *State v. Richmond*, 590 N.W.2d 33, 35 (Iowa 1999).

The District Court carefully and thoroughly reviewed the assertion of the clergy privilege by the Church in this case, conducting an “in camera” review of documents challenged by the Plaintiffs.⁹ Notably, the District Court did not apply the clergy privilege to all of the communications for which it was asserted but rather evaluated each communication and applied its discretion in determining which communications were within the scope of the privilege. (*See* C.App.II 250-269). Because of Plaintiffs’ persistence in attempting to re-litigate the District Court’s determination of this issue and its applicability, the District Court issued eleven separate rulings addressing the applicability of the clergy privilege. The District Court did not abuse its discretion in any of its rulings applying the clergy privilege to the specific communications challenged by Plaintiffs.

Division VI: The District Court’s discovery rulings must be upheld.

A. Error preservation.

It is difficult to determine whether Plaintiffs have preserved error on the arguments raised in their opening brief because they have not articulated them in any detail. The Church agrees Plaintiffs preserved error on issues

⁹ On April 18, 2016, Plaintiffs sought to expand the documents they wished the District Court to review “in camera.” The District Court denied the request as untimely. (C.App.II 606-607).

that were raised by Plaintiffs and addressed in the various rulings of the District Court.

B. Standard of review.

The Court's standard of review of discovery rulings is for abuse of discretion. *Sioux Pharm, Inc. v. Eagle Laboratories, Inc.*, 865 N.W.2d 528, 535 (Iowa 2015).

C. Plaintiffs have waived or abandoned any issue on the District Court's discovery rulings because they have not sufficiently described the issues to enable either the Church or the Court to address the issues.

Other than to provide the Court with a list of discovery rulings entered by the Court and a long footnote with a list of Bates stamped documents, the Plaintiffs provide no argument or detail as to why they contend the listed rulings be "reversed." Plaintiffs only vaguely ask the Court "to reverse the district court's rulings in regard to the footnoted documents" and "reverse the district court's ruling in which it refused to enforce its prior orders regarding the footnoted documents." Pl. Br. at 77, 78.

"Issues are deemed waived or abandoned when they are not stated on appeal by brief; random discussion of difficulties, unless assigned as an issue, will not be considered." *Hubby v. State*, 331 N.W.2d 690, 694 (Iowa 1983). *See Soo Line R. Co. v. Iowa Dept. of Transp.*, 521 N.W.2d 685, 691 (Iowa 1994) ("Soo Line's random mention of [an] issue, without elaboration

or supportive authority, is insufficient to raise the issue for our consideration.”). Plaintiffs’ failure to articulate how the District Court abused its discretion constitutes a waiver or abandonment of this issue on appeal.

D. The District Court did not abuse its discretion in its discovery rulings.

Plaintiffs have not described the rulings they challenge in sufficient detail that the Court can determine whether the District Court has abused its discretion. The burden is on Plaintiffs to convince this Court that the District Court abused its discretion. *See McClure v. Walgreen Co.*, 612 N.W.2d 225, 235 (Iowa 2000). They have woefully failed to do so. The District Court did not abuse its discretion in its discovery rulings.

The only issue Plaintiffs even come close to raising with any specificity is the District Court’s refusal to conduct yet another “in camera” review of another whole set of documents Plaintiffs belatedly sought to challenge. Plaintiffs’ Fourth Motion to Compel was filed long after the documents had been identified as privileged and more than 1½ years after their first Motion to Compel challenging the clergy privilege. The District Court denied that part of the Fourth Motion to Compel, holding,

Discovery is closed. The documents now challenged by plaintiffs were identified as privileged long ago and were not challenged until now. The court is not inclined to essentially

reopen and prolong the discovery process by now engaging in the time consuming project of *in camera* inspection of a large number of documents on the virtual eve of trial. The motion is denied.

(C.App.II 606-608).

The District Court did not abuse its discretion in that ruling.

Conclusion

Defendant-Appellee Covenant Reformed Church respectfully requests that the Court affirm the judgment of the District Court.

Request for Oral Submission

Defendant-Appellee Covenant Reformed Church respectfully requests oral argument on the issues presented in this appeal.

**Certificate of Compliance with Typeface Requirements and Type-
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Dated this 25th day of May, 2017.

/s/ Frances M. Haas, AT0009838

Certificate Of Filing And Service

I hereby certify that on May 25, 2017, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

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